Yee Hoong Loong Corp Sdn Bhd v Kwong Fook Seng Co

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–121 OF 1991
PEH SWEE CHIN SCJ
31 JULY 1992

Arbitration *— Question of law — Application made to arbitrator to state a special case was refused — Order sought to direct arbitrator to state special case — Exercise of discretion by the arbitrator — Principles applicable in the exercise of discretion*

The applicant ('developer') employed the respondent ('contractor') in a housing scheme in respect of which differences arose and the dispute between the parties was referred to arbitration. The arbitrator made an interim award. After the making of the award, the developer requested the arbitrator to state a special case for the decision of the court on a point of law. The arbitrator refused, whereupon the developer made an application by way of an originating summons to the court for an order directing the arbitrator to state in the form of a special case whether the finding of illegality by the arbitrator precludes the claimant from pursuing its alternative claim of quantum meruit relying on the agreement dated 3 May 1987.

Held, dismissing the application:

(1) The question before the court was whether the learned arbitrator had correctly exercised his discretion in refusing to state a special case. Three conditions have to be fulfilled before such a request can be granted by an arbitrator. Firstly, the point of law must be real and substantial. Secondly, the point of law should be capable of being accurately stated as a point of law. Thirdly, the point of law should be of such importance that the resolution of it is necessary for the proper determination of the case.

(2) In this case, the question of law would not be a point of law the resolution of which would be necessary for the determination of the arbitration. What the arbitrator did was proper or justifiably proper and correct, although the legal reason was wrong. If the court had held the arbitrator to his wrong legal ground and ignored the facts and situations revealed by the evidence and justice of the case, it would lead to a deprivation of the respondent of millions of ringgit worth of work done for it, if such work could be proved.

[Bahasa Malaysia Summary

Pemohon ('pemaju') telah menggaji penentang ('kontraktor') dalam suatu skim perumahan di mana perbezaan timbul dan pertikaian di antara kedua-dua pihak itu dirujukkan kepada timbangtara. Penimbangtara telah membuat suatu award interim. Selepas membuat award itu, pemaju itu telah meminta supaya penimbangtara menyatakan

suatu kes khas untuk keputusan mahkamah atas perkara undang-undang. Penimbangtara itu enggan membuat begitu dan pemaju itu telah membuat permohonan mengarahkan penimbangtara menyatakan dalam forma kes khas samada kepenyalahan undang-undang oleh penimbangtara menghalang pihak penuntut daripada meneruskan tuntutan yang alternatif untuk kuantum meruit berdasarkan perjanjian bertarikh 3 Mei 1987.

Diputuskan, menolak permohonan itu:

(1) Soalan di hadapan mahkamah adalah samada penimbangtara yang arif telah menggunakan budi bicaranya dengan betul apabila beliau enggan menyatakan suatu kes khas. Tiga syarat mesti dipenuhi sebelum permintaan sebegini boleh dibenarkan oleh seseorang penimbangtara. Pertama, perkara undang-undang itu mestilah benar dan substansial. Kedua, perkara undang-undang itu mestilah dapat dinyatakan dengan tepat sebagai suatu perkara undang-undang. Ketiga, perkara undang-undang itu mestilah begitu penting sehingga penyelesaiannya adalah perlu untuk penentuan kes itu.

(2) Di dalam kes ini, soalan undang-undang bukanlah soalan undang-undang di mana penyelesaiannya adalah perlu untuk penentuan timbangtara itu. Apa yang dibuat oleh penimbangtara adalah betul atau boleh dijustifikasikan walaupun alasannya dari segi undang-undang adalah salah. Jika mahkamah mengambil kira alasan penimbangtara yang salah dari segi undang-undang dan tidak mempedulikan fakta dan keadaan yang didedahkan oleh keterangan dan keadilan kes itu, ia akan mengakibatkan kehilangan oleh penentang berjuta-juta ringgit untuk kerja yang telah dibuat, jika kerja itu dapat dibuktikan.]

Cases referred to

1 *Halfdan Grieg & Co v Sterling Coal & Navigation Corp & Anor* [1973] 2 All ER 1073
2 *Way v Latilla* [1937] 3 All ER 759
3 *Craven-Ellis v Canons Ltd* [1936] 2 KB 403
4 *Menaka v Lum Kum Chum* [1977] 1 MLJ 91

VS Viswanathan (*Kean Chye & Sivalingam*) for the respondent.
Chan Kok Keong (*Chan & Assocs*) for the appellant.

Cur Adv Vult

Peh Swee Chin SCJ: Two parties to an arbitration have been engaged in such arbitration before an arbitrator commencing on 18 November 1989 and the hearing continued on various different dates until 19 November 1990 when the learned arbitrator made his interim award. Before the learned arbitrator, the claimants have been Kwong Fook Seng Co ('the contractors') suing as a firm, and the defendant, Yee Hoong Loong Corp Sdn Bhd ('the developer').

The developer employed the contractors in some housing scheme in respect of which differences appear to have arisen and they have been referred to arbitration.

The developer, after the making of the interim award, took out an originating summons before me for an order that the learned arbitrator (Dato' Liew Whye Hone, advocate and solicitor) do state in the form of a special case for the decision of the court on the following question of law:

> Whether the finding of illegality by the arbitrator precludes the claimant from pursuing its alternative claim of quantum meruit relying on the agreement dated 3 May 1987.

The question of law cited above and stated by the learned counsel for the developer appears to have been prompted by certain views explained by the learned arbitrator in paras 31–34 of his interim award; the paragraphs are set out below for ease of reference:

> 31 I now come to consider the bridging finance facilities. The original application according to Mr Lim of Ban Hin Lee Bank was based on a building contract for RM5.3m. This was rejected by Mr Lim as it cannot tally with the cash-flow submitted to him. Subsequently another building contract for RM7,799,000 was submitted to him. Loan is based on valuation by the bank. But releases being based on work done is based on percentages of work done and therefore the higher the contract sum the higher is each release. Hence the higher cost requirements shown in the cash-flow cannot be justified and obtainable by a contract for RM5.3m. The original of the RM5.3m contract was never produced, but I have no strong reason to doubt the oral evidence of Mr Lim.
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> 32 Considering all that I have stated and these are what I consider only relevant, I am inclined to believe that the contract sum of RM7,799,000 is inflated somewhat. But above all considering the nine certificates non-payment demand in writing after the ninth certificate and the manner in which the building contract was signed and the manner in which the sub-contracts were made and other dealings between the parties recorded in the documents and oral evidence I come to the inevitable conclusion that the building contract is not intended by the parties to be followed or enforceable. This leads to the building contract which comes under s 24 of the Contracts Act 1950. Subsection (d) involves or imply injury to the person or property of another and in this case, the bank is influencing it to release sums faster than it would otherwise do. Hence the contract is unlawful and void.
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> 33 What is the actual relationship between the parties, one would ask. To ascertain their true relationship is only an exercise in futility. Even the parties themselves do not have any clear cut idea of their relationship.
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> 34 I would therefore decide what is just and equitable. To argue that because there is no building contract there can be no claim on quantum meruit is not all that correct. The claimant can claim on quasi-contract. Section 65 of the Contracts Act 1950 binds any person who has received any advantage under the agreement or contract to restore to or make compensation for it to the person from whom he received it. Further under s 37 of the Specific Relief Act 1950 the court may require the party to whom the relief is granted to make any compensations to the other which justice may require. This I think codifies the equitable principle of unjust enrichment.

The learned arbitrator refused to state a special case as applied for by the developer who then applied for an order directing him to do so to the High Court.

The question before the court was whether the learned arbitrator had correctly exercized his discretion in so refusing. What are the principles or conditions which the learned arbitrator ought to consider when he is exercizing such a discretion?

In *Halfdan Grieg & Co v Sterling Coal & Navigation Corp*,[1] the Court of Appeal (Lord Denning MR, Megaw and Scarman LJJ) set out three conditions which have to be fulfilled before a similar request can be granted by an arbitrator. They are, first, that the point of law must be real and substantial; secondly the point of law should be capable of being accurately stated as a point of law and thirdly the point of law should be of such importance that the resolution of it is necessary for the proper determination of the case — as distinct from a side issue of little importance.

If he did not give any legal reason for doing so, what he had done could not possibly have attracted any serious objection from the developer, for both parties had all along acted on the basis that the building contract was valid, or on the belief that it was valid until the learned arbitrator mentioned his legal ground for doing so.

The legal ground he mentioned was that because the price as stated in the building contract, had been inflated and other evidence, the whole building contract was void under s 24 of the Contracts Act 1950 (Rev 1974) for causing injury to the property of the said bank. It has been seen the said bank had practically sought the inflated figure so as to tally with the said cash-flow, bearing in mind that the bank would earn more by lending more, not having been compelled by any social duty or other reason to do so, therefore, the real mischief was the inflated contract price, with which the value of the work done by the contractors could not be measured.

For what he did, ie by not following the inflated contract price but on the basis of quantum meruit, a correct legal ground for the learned arbitrator would have been that the contract price could not be RM7.799m but value of work was to be assessed to be what he thought was fair from the evidence on quantum meruit to be awarded as an alternative to general damages and specific performance (if applicable) for breach of contract.

Or another legal ground would have been simply that the learned arbitrator's assessment for value of work done by way of quantum meruit was just an incident of assessment of the value of work done.

Or another correct legal ground would have been that the clause in the building contract; fixing the price of RM7.799m was a sham designed by both parties, and therefore, the clause had never come into being by consensus and therefore on the basis it was non-existence, and there was no such clause fixing the price; quantum meruit would be the proper and only remedy as already awarded by the learned arbitrator, please see eg *Way v Latilla*[2] in which the court assessed and fixed reasonable remuneration for work done when it was not so fixed. In the same vein, the clause could have been declared by the learned arbitrator as void as intended because it was fixed as required by the bank manager, in that case a court could also order quantum meruit, see *Craven-Gills v Canons Ltd*[3] in which quantum meruit

A was ordered in regard to a managing director's remuneration when it was found that his appointment as managing director was void because he did not hold qualification share.

Again in any event, under s 66 of the Contracts Act 1950, a court can lawfully order reasonable compensation for any benefit obtained and given under a contract by any party when the contract is found to be void for any valid legal reason whatsoever, provided that both parties or the party seeking such reasonable compensation, did not know at the time of contract that it was not valid. Reasonable compensation would be the same in my opinion as quantum meruit, the latter expression being just a name of a remedy for reasonable compensation used in various contexts. In the leading case of *Menaka v Lum Kum Chun*,[4] money was lent in the name of a partner of a firm of licensed moneylenders instead of the name of the said firm in breach of a provision in the Licensed Moneylenders Ordinance 1953. The Privy Council also held that the transaction was illegal and since both parties believed it was valid when it was done, s 66 of the Contracts Act 1950 applied and the Privy Council upheld the order to have the balance of the principal paid back to the moneylenders by the borrower.

Therefore, what the learned arbitrator did was proper or justifiably proper and correct eg by assessing the price for work done on the basis of quantum meruit but the legal reason was wrong. Should I have held him to his wrong legal ground and ignored the facts and situation revealed by the evidence and justice of the case, ie work and materials worth millions of dollars have been done and supplied respectively? I would no more hold a learned counsel to a legal submission of his which happens to be wrong in deciding liability of a litigant or in deciding whether an accused should be made to walk up to his gallows.

I was of the view that the question of law would not be a point of law, the resolution of which would be necessary for the determination of the arbitration case thus the developer before me did not fulfill condition no 3 laid down in the *Halfdan* case.[1] If the developer had his way, it could amount to a deprivation of the claimants of millions of dollars worth of work done for it, if such work could be proved.

I therefore dismissed the application of the developer, ie Yee Hoong Loong Corp Sdn Bhd with costs.

Application dismissed.

Reported by S Radakrishnan